FILED
MAY 27 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted]100

J. BAKER BEYAN AND MARY EVELYN BEYAN, *Petitioners*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

J. BAKER BEYAN, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

C. J. BATTEN
910 Seventeenth Street, N. W.
Washington 6, D. C.
Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

PETITIONS FOR WRITS OF CERTIORARI 1-12

Jurisdiction 2
Summary Statement of Matter Involved 2
Questions Presented 7
Reasons for Granting Writs 10

SUPPORTING BRIEF 13-21

Opinions Below 13
Jurisdiction 13
Statement of the Case 13
Specification of Errors 13
Argument 16-21

Summary 16
Presumption attaching to deficiency notice 17
Proof of fraud 19
Conclusion 21

APPENDIX 22-24

Section 1254 Title 28 U.S.C. 22
Section 2101 Title 28 U.S.C. 22
Section 41 Title 26 U.S.C. 22
Section 275 Title 26 U.S.C. 23
Section 276 Title 26 U.S.C. 23
Section 293 Title 26 U.S.C. 23
Section 1112 Title 26 U.S.C. 23
Section 1141 Title 26 U.S.C. 23
Section 3748 Title 26 U.S.C. 24

AUTHORITIES 17

Cohen v. Com. (10 C.C.A.) (176 F. 2d 394) 17
Burrows, Elsa S. (1943 P.H.T.C. Memo. par. 40,308) 19
Easton, Barth A. (1943 P.H.T.C. Memo. par. 43,063) 19
Harris v. Com. (4 C.C.A.) (174 F. 2d 70) 17
Joint Committee on Internal Revenue Taxation (Report of Hearing on September 25, 1953, pages 17-18) 11
Reis, C. A. (I.T.C. 9, 13) 18
Snell Isle, Inc. v. Com. (5 C.C.A.) 90 F. 2d 481) ..17, 18
Stanton, T. M. (19 P.H. Memo. T.C. par. 47,251) .. 18
U.S. v. J. Baker Bryan (5 C.C.A.) (175 F. 2d 223) 3, 4, 5, 6, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

J. BAKER BRYAN AND MARY EVELYN BRYAN, *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

J. BAKER BRYAN, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, J. Baker Bryan and Mary Evelyn Bryan, by their undersigned attorney, respectfully pray for writs of certiorari to the United States Court of Appeals for the Fifth Circuit to review the final judgment

of that Court in the above consolidated cases filed January 29, 1954 (R. 324). A petition for rehearing (R. 336) was denied on March 5, 1954 (R. 342) and mandate issued March 19, 1954.

Jurisdiction

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 1141 (a) Title 26 U.S.C. Section 1254 of Title 28, U.S.C., and Section 2101 (c) of Title 28 U.S.C.

The judgment of the United States Court of Appeals for the Fifth Circuit which petitioners seek to have reviewed was entered on January 29, 1954 (R. 335), petition for rehearing was denied March 5, 1954 (R. 342) and mandate issued March 19, 1954.

Summary Statement of the Matter Involved

The United States Court of Appeals for the Fifth Circuit affirmed (R. 324) the judgment of The Tax Court of the United States in two cases involving your petitioners, husband and wife, and their income tax returns for the years 1941, 1942, 1943 and 1944 (R. 125, 184, 186, 187).

The Commissioner instituted his proceedings by jeopardy assessment and deficiency notice after the three year statutory period barring such action unless it comes within one of the exceptions to the general limitations. To accomplish this he alleged the filing of false and fraudulent returns with the intent to evade the tax. The statute (Section 1112) Title 26 U. S. C. imposes upon the Commissioner the burden of proof on the issue of fraud.

Ordinarily the presumption of correctness attaches to the deficiency notice issued and the taxpayer has the burden of disproving such deficiency.

Here the Tax Court of the United States and Circuit Court of Appeals for the Fifth Circuit have held that the presumption of correctness obtains, even though the general statute of limitations has expired; whereas, your pe-

titioners contend that after the statute of limitations runs, no such presumption exists.

This basic question, if answered in the negative, as your petitioners believe it should be, will dispose of the case; because the finding of fraud and deficiency for all years before the Court and negligence penalty for one of the years, depends entirely on the presumption attaching.

If the question is answered in the affirmative, as The Tax Court and the Circuit Court hold, a further question arises, and we are not concerned here with the degree of proof—be it a preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt. What we are concerned with is, whether there is any proof of fraud at all. That is, where the Fifth Circuit reverses a conviction, as it did here, on the grounds that the tendered proof lacked all probative value (175 F. 2d 223) and the case should not have gone to the jury; can the same Court, on the same evidence, containing the same defects, hold that such tendered proof for the purposes of the civil case, does constitute proof of fraud with intent to evade the tax.

If this question is also answered in favor of the Government, a third question is posed and that is: did the Courts below properly disregard the uncontradicted testimony of fourteen witnesses tendered by the taxpayer in rebuttal, all testifying to large sums of cash possessed by the taxpayer over a great number of years, and used by him in his affairs, and over which cash he exercised complete control and dominion on the ground that "there was no showing that the money he handled was his own." (R. 146); or, was it the Government's burden to prove that such cash was not his. Or, if, we adopt the premise that such cash was not his before the years here involved, by what rationale can it be held that it became his during the taxable years here involved, and suddenly became taxable income.

The facts briefly stated are: the respondent in October

1945 started an examination of the petitioners' tax returns (R. 324). The returns for the years 1935, 1936, 1937 and 1938 had previously been examined and accepted (R. 133, 134, 135) and no understatement of tax shown. In October 1945 the three year statute on all returns for the period 1935 to 1944 inclusive had expired, excepting the years 1942, 1943 and 1944 (R. 325). All returns were filed timely, excepting the 1943 returns filed in April 1945 (R. 325). All returns excepting the 1944 return were individual returns of J. Baker Bryan—the 1944 return was a joint return of J. Baker Bryan and Mary Evelyn Bryan (husband and wife) (R. 27). No waiver, agreeing to extend the period within which an assessment of income tax may be made, was executed for any of the years (R. 130) and the returns for the years 1935 (R. 133), 1936, 1937 (R. 134) and 1938 (R. 135) had theretofore been examined and accepted (R. 133, 134, 135). In July 1948, after the three year statute of limitations had barred the making of any assessments or the asserting of any deficiency, the respondent made jeopardy assessments of taxes, penalties and interest and issued deficiency notices alleging fraud for the years 1935 to 1944 inclusive (R. 325) and endeavored to bring himself within the exception to the statute (Section 276 (a)) by determining fraud with intent to evade the tax. At the trial the taxpayer proved that the three year statute of limitations (Sec. 275 (a) Title 26 U. S. C.) had expired and rested his case-in-chief (R. 327) and Counsel for the Commissioner then acknowledged that "the burden is on us to show fraud in order that the Commissioner's determination may stand." (R. 327)

Prior to July 1948, the taxpayer (J. Baker Bryan) had been indicted in four counts for income tax evasion for each of the years 1941, 1942, 1943 and 1944. He was convicted on counts 3 and 4, covering the years 1943 and 1944, and on appeal to the Court below the cause was reversed and

remanded for a new trial as to those two counts (175 F. 2d 223). To this date such new trial has not taken place.

Your petitioners were absolved of fraud for the years 1935, 1936 and 1940 (R. 325) and for the six years 1935 to 1940 inclusive the net deficiency found by The Tax Court amounted to $912.38. (R. 53, 188). Your petitioners in seeking review by the Fifth Circuit, while not admitting the correctness of the decision of The Tax Court for the years prior to 1941 (R. 325) confined the review to the years 1941 to 1944 in order to recoup from the respondent—as they did on November 24, 1952, the sum of $38,-167.59 in overpayments of tax, penalties and interest—sacrificing $912.38 in order to get $38,167.59.

The respondent in his deficiency letter determined the income of the taxpayers by the net worth method. At the Tax Court trial the petitioners proved that the three year period of limitation had expired as to each return prior to the time the jeopardy assessments were made, and then rested their case-in-chief. The respondent then acknowledged that "the burden is on us to show fraud in order that the Commissioner's determination may stand (R. 327)." The petitioners offered rebuttal proof of the existence of other assets, namely a large amount of cash, through a series of fourteen witnesses (R. 258-309).

The Tax Court did not disbelieve the testimony respecting the cash; instead it held "but there was no showing that the money he handled was his own." (R. 146) and further held that the net worth method (minus the cash) established the fraud, and that the burden of proof in overcoming the deficiency notice was upon the petitioner and he had not sustained that burden (R. 148); further, despite the absence of findings, that the delinquency penalty for 1943 was proper, because the petitioner "failed to show why such delinquency penalty should not apply." (R. 185).

The Circuit Court in affirming the Tax Court rejected the taxpayer's contention that the Commissioner's determination was stripped of its presumption where the statute

of limitations has operated as a bar; (R. 327) and held that "the findings of The Tax Court that the taxpayer had no assets of appreciable value other than those listed in its findings of fact is supported by the preponderance of the evidence." (R. 333); also the taxpayer had the burden of proof to show reasonable cause for failing to file the 1943 returns timely (R. 334) and based on the net worth method that "For a period extending over eight years he habitually reported only a portion of his income and, during the years under review, only a small fraction of such income. This course of conduct on the part of the taxpayer over such an extended period of time warrants the finding that the false returns were filed with the intent to evade tax."

The net worth method of determining income was tendered in the criminal trial, and the Circuit Court went to great lengths to point out to the Government wherein the tendered proof failed to make out a *prima-facie* case (175 F. 2d 223, 225, 226). In the civil trial Counsel for the taxpayer, by cross-examination of the Government witnesses, procured their frank admissions that the proof then tendered contained the same defects (R. 230-231, 241-243) the Appellate Court held fatal in the criminal case (175 F. 2d 223).

On rebuttal the taxpayer showed that at all times since 1913 he had and used vast sums of cash, in fact it is admitted that prior to 1940 (R. 147-148) he did not maintain a bank account, although he was a large property owner and conducted large cash business transactions (R. 146). He was always a man of means.

Despite the fact that the Tax Court Findings and Opinion do not discredit the testimony of cash, but goes off at a tangent and holds "there was no showing that the money he handled was his own" (R. 146); the reviewing Court holds that "it was within the province of the Tax Court, as trier of the facts, to reject the testimony of the taxpayer's witnesses with respect to his large cash reserves." The Tax Court did not reject such testimony, in fact, ap-

proved it because it held there was no showing the money was his own.

Questions Presented

Hence, from your petitioner's viewpoint, these are the

1. Does the Commissioner's deficiency notice carry with it a presumption of correctness when issued after the expiration of the three year statute of limitations period and no waiver of such three year statutary period has been entered into by the taxpayer and the Commissioner; or

Is it stripped of any presumption of correctness when so issued upon proof of the expiration of said three year period and no waiver extending such period?

2. Does the admission of Government auditors that they are unable to say that their computation—in determining net income by the net worth method—included all of the assets of the taxpayer at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings or evidence, tending to bind the taxpayer to the lack of additional assets at the beginning of the period meet the requirements of establishing fraud by clear and convincing evidence in a civil fraud case; or

Do such admissions by the Government auditors and the absence of any of the foregoing facts tending to bind the taxpayer, remove the presumption of correctness attaching to such deficiency notice?

3. Where the Fifth Circuit Court of Appeals in a criminal case involving the same taxpayer holds that the net worth method of determining net income, subject to the defects set forth in Question 2 above, is insufficient to make out a *prima facie case* against the taxpayer; and Counsel for the taxpayer in the civil fraud case elicits the same admissions from the Government auditors as set forth in Question 2 above and there is an absence of any of the

conditions tending to bind the taxpayer; has the Government made out a *prima facie case;* or

Do such admissions by the Government auditors and the absence of factors tending to bind the taxpayer, result in a net worth method lacking in probative value in a civil case as well as a criminal case?

4. Where the testimony shows that over a period of twenty years immediately preceding the beginning of the net worth computation the taxpayer had all his business dealings in cash, and did not open a bank account until five years after the beginning of the net worth computation; and further shows that during such twenty years fourteen different witnesses had numerous personal experiences with the taxpayer each involving sums of cash ranging from $25,000 to $180,000; and there is not a scintilla of evidence that such cash was not his own property, can the Tax Court omit such cash from the net worth computation on the ground that "there was no showing that the money was his own." (R. 146); or,

Does not such evidence establish the ownership of such cash, and require its inclusion in the net worth computation in the absence of the Government going forward with proof to show that the taxpayer did not own such cash?

5. Where the Tax Court held "there was no showing that the money was his own" was it not error for the Court of Appeals to hold "that it was within the province of the Tax Court, as trier of the facts, to reject the testimony of the taxpayer's witnesses with respect to his large cash reserves"?

6. Was the Court below correct in holding that the Commissioner could depart from the mandate of Section 41 (Title 26 U.S.C.) which requires that net income be computed in accordance with the method of accounting regularly employed by a taxpayer unless such method does not clearly reflect ncome; and, use the net worth method as

one that clearly reflects income, in discharge of his burden of proving fraud, when the record shows that:

(a) Of the two auditors who testified for the Government one testified that he did not audit the books (R. 234, 236, 244) and the other testified that he "switched" to the net worth method because public records disclosed purchases and sales not reflected on the returns (R. 212); and then further testified that there was nothing improper in such omissions from the returns (R. 226) and the sales disclosed no differences between the books and returns (R. 212); and

(b) The Court below in reversing the criminal case involving the same taxpayer for the same years states at page 234 (175 F. 2d 233) as follows:

> "No witness gave any direct testimony as to any specific instances of failing or refusing to account for gross business income. Such records as were kept by Defendant make no such revelations. No evidence was produced from any books or records of the Defendant showing gross income in excess of that reported. No proof has been produced of duplicity in keeping more than one set of books."

and there was no testimony at the civil trial to meet these shortcomings; and

(c) The Tax Court imposed upon the taxpayer proof that the statute imposes on the Government where fraud is charged, by stating in its opinion (R. 144-145):

> "Nor have those books which he did keep been shown to be accurate. While the figures in the books could be traced through to corersponding figures on the income tax returns, there was no verification of the figures which appears in the books other than by spot checks of tapes which were handwritten. There was no showing as to whose writing was on these tapes nor at what time they were prepared. No cash register tapes, which were supposedly used in making the book entries, were submitted in evidence; nor does the record show that all receipts were rung up on the cash registers. All of petitioner's interests were not reflected

> by his books and numerous figures which were used in preparing tax returns were given to the person who prepared the return for the petitioner either by him or by Evelyn. No evidence was introduced to verify these figures."

instead of holding that the Tax Court should have held (paraphrazing the above):

> The books were not shown to be inaccurate. There was no evidence that the figures in the books which could be traced through the corresponding figures on the income tax returns were false. There was no showing that the tapes were not prepared at the time the entries were made. The record does not show any instances where the receipts were not rung up on the cash registers. There is no evidence that the figures not in the books given to the person preparing the return were inaccurate.

Reasons for Granting Writs

If there ever was a case deserving the tme and attenton of this Court in the exercise of its supervision over the lower Courts, this is such a case. This case not only presents such a problem, in order that "Equal Justice under Law" may prevail; but it also presents points of law that should be clarified.

The burden of proof and the presumption attaching to a deficiency notice issue by the respondent after the statute of limitations has expired is of major importance in the administration of the tax laws of this country. This Court has not spoken on the subject and there is such a conflict between the pronouncements of the Tax Court on this subject (although not applied here) and the holdings of the reviewing Court (Fifth Circuit) that the state of the law is most unsettled.

Likewise, the substitution of the net worth method as here applied for the regular method of accounting employed by the taxpayer—and more particularly the acceptance of such method by the Court below where it had previously

rejected such method (involving the same taxpayer) as not making out a *prima facie* case—if, permitted to stand, creates a conflict in rationalizing cases, that is beyond understanding, and, gives the stamp of judicial approval to a misuse of a method that the respondent has admitted in hearings before the Joint Committee on Internal Revenue Taxation (pages 17-18, Report of Hearing on September 25, 1953) to have been so misapplied that he proposes (page 18) "to send out a manual to include in our training, which is an up-to-date discourse on how to use the net worth theory."

Furthermore, the omission of cash from a net worth computation on the grounds that "there was no showing that the money he handled was his own" (R. 140) in the absence of evidence that it was not his own, is a departure from realities of sufficient importance to warrant the intervention of this Court.

The major reason why the writs here requested should be granted is the means by which fraud was supposedly established. The record shows that for a period of over twenty years before and five years after the beginning of respondent's net worth computation the petitioner had all his dealings in cash and had no bank account. He admittedly handled large sums of cash and conducted large transactions as a principal in cash. During the years covered by the net worth method there were large property additions. Such increase in property other than cash is the sole basis for sustaining a fraud charge. There was not a shred of evidence to sustain a fraud charge, other than the increase in property. Obviously, the property additions were from petitioner's cash. In view of the undisputed fact that he had cash before the beginning of the net worth period, what basis is there to hold that "there was no showing that the money he handled was his own" and then hold that the property acquired with such cash was his and becomes taxable income subject to civil fraud charge?

WHEREFORE, your petitioners pray that writs of certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of such Court of Appeals had in this cause, to the end that the decision herein may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be reversed; and that the petitioners be granted such other and further relief as may seem proper.

C. J. BATTER
910 Seventeenth Street, N. W.
Washington 6, D. C.
Attorney for the Petitioners

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Opinions Below

The decision of the Circuit Court of Appeals for the Fifth Circuit affirming the Tax Court of the United States is reported in 209 F. 2d 822 and appears in the record here at page 324. The Petition for Rehearing denied March 5th, 1954 is not supported by an opinion but appears in the record at page 342. The decision of the Tax Court of the United States is reported at Par. 51313 Volume 20, P. H. Memo T. C. and at page 125 of the record here.

Jurisdiction

Jurisdiction is conferred upon this Court to review the cause by writ of certiorari by Section 1141 (a) Title 26, U.S.C. and Section 1254 and 2101 (c) of Title 28 U.S.C.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 29, 1954 (R. 324); petition for rehearing was denied March 5, 1954 (R. 342); and mandate issued March 19, 1954.

Statement of the Case

The principal facts are set forth in the petition at pages 3-7 under the title "Summary Statement of the Matter Involved".

Specification of Errors

The United States Court of Appeals for the Fifth Circuit erred:

1. In holding that a deficiency notice issued after the statutory period has expired, but purportedly within one of the exceptions to the general statute, carries with it a presumption of correctness, and the taxpayer in order to prevail, must overcome such presumption. (R. 327).

2. In holding that, notwithstanding the expiration of the statute of limitations, the taxpayer must overcome the pre-

sumptive correctness of the deficiency notice (R. 327), must go forward with the proof (R. 327) and will fail in such proof unless he establishes that the books are accurate (R. 144); establishes that the figures on the books which can be traced through to corresponding figures on the income tax returns were not false (R. 144-145); establishes in whose handwriting the tapes supporting book entries were made and when they were made (R. 145); produces the cash register tapes used in making the book entries (R. 145); establishes that all receipts were rung up on the cash registers (R. 145) and; verifies the figures not on the books supplied to the person preparing the income tax return. (R. 145).

3. In failing to hold that where the statute of limitations has expired, the Commissioner—in order to reject the books as not clearly reflecting income, and in order to substitute the net worth method as clearly reflecting income—must establish that the books are inaccurate; that the figures on the books traceable to the income tax returns are false; that the tapes supporting book entries were not made in the ordinary course of business and that the handwriting appearing on such tapes was not that of an employee authorized to make such tapes; that the failure to produce cash register tapes is deliberate and with intent to deceive; that not all the receipts were rung up on the cash register; and that the figures not on the books supplied to the person preparing the income tax return are false.

4. In holding that the Commissioner could prove fraud by substituting a net worth method for the books where his agents were unwilling to swear that the books did not clearly reflect income by proof of some of the factors set forth in Error No. 3.

5. In holding that a net worth method did establish fraud, notwithstanding the fact that the Commissioner's agents were unwilling to swear that such method included substantially all the assets of the taxpayer at the beginning

of the period; whereas the same Court, in a previous criminal case involving the same taxpayer, rejected such net worth method for the aforesaid reasons, holding that such method under such circumstances did not constitute a *prima-facie* case and such criminal case should not have gone to the jury. (175 F. 2d 223, 227).

6. In holding that the Tax Court's finding that the taxpayer had no assets of appreciable value was supported by the preponderance of the evidence, notwithstanding the fact that the Tax Court in its opinion, at least by inference, acknowledged the existence of a large amount of cash on hand but disregarded it because "there was no showing that the money which he handled was his own". (R. 146).

7. In failing to hold that the Tax Court erred in not holding that since the taxpayer showed a constant use of cash in large business dealings over a period of twenty years by fourteen witnesses and the absence of any bank account prior to five years after the beginning of the net worth period, it was the burden of the Commissioner to go forward with the proof and show that the money which he handled was not his own; and that in the absence of such showing by the Commissioner his net worth method lacked probative value.

8. In failing to reverse the decision of the Tax Court on the grounds that the record contains no record of fraud whatsoever; and that the faults set forth by the Court below in its opinion in the criminal case (175 F. 2d 223-224) that: "No witness gave any direct testimony as to any specific instances of failing or refusing to account for gross business income. Such records as were kept by the Defendant made no such revelations. No evidence was produced from any books or records of the Defendant showing gross income in excess of that reported. No proof has been produced of duplicity in keeping more than one set of books." were not in any manner supplied in the civil trial.

ARGUMENT

Summary of Argument

The writs here applied for should issue because we raise two fundamental issues that should be passed upon by this Court in the interest of a proper administration of the tax laws. If the decision in the case at bar is permitted to stand, the statute of limitations and the statute imposing the burden of proof on the Commissioner in an alleged fraud case, serve no purpose and might just as well be taken off the statute books. No taxpayer, will be safe in his belief that the Commissioner cannot go back as far as 1913—the date of the first income tax—and by the mere allegation of fraud, strip such taxpayer of all his worldly possessions.

If the presumption of correctness attaches to the deficiency notice, even though the general statute of limitations has expired, there is no reason why the Commissioner by going back far enough will reach a stage where any taxpayer is no longer able to rebut the presumption so attaching; and, if, in turn the failure to overcome such presumption can then be used as proof by the fraud issue, the burden of which proof is by statute upon the Commissioner, no taxpayer will be free from a fraud charge and the resulting penalties. Such a condition lends itself to all the tyrannical power of an unscrupulous Government, rather than the freedom from fear fundamental to our form of Government.

Under the law a taxpayer cannot be indicted and prosecuted for making a false and fraudulent tax return unless such indictment is procured within six years from the date of making the return or the due date of the return or the failure to make a return at all (Sec. 3748 Title 26 U.S.C.). The purpose, of course, is to lay at rest the return for such year and not subject a taxpayer to impossible proof to defend himself. The witnesses die just as readily when needed for a civil case as they do when needed for a crimi-

nal case. The books and records become just as difficult to assemble in a civil case as they do in a criminal case.

Would it be just to hold that in a civil case the Commissioner can ignore and cast aside such books and records as are available, and by substituting a net worth method however faulty, and cast upon the taxpayer the burden of disproving such deficiency notice, and upon failure so to do, have such deficiency notice serve as proof of fraud?

We think not and appeal to this Court for relief because in the case at bar there was not one scintilla of direct evidence of fraud.

Presumption Attaching to Deficiency Notice

Where the Commissioner issues a deficiency notice within the statutory period of limitations it carries with it a presumption of correctness and the taxpayer has the burden of overcoming such presumption. The Court below held that such presumption attaches even though such notice be issued after the statute of limitations has run, and cites *Harris* v. *Commissioner,* 4 Cir. (174 F. 2d 70); *Cohen* v. *Commissioner,* 10 Cir. (176 F. 2d 394) and *Snell Isle, Inc.* v. *Commissioner,* 5 Cir. (90 F. 2d 481). This Court has not passed on the question.

In *Harris* v. *Commissioner,* 4 Cir. (176 F. 2d 934) fraud was independently established (p. 72) and the taxpayer denied he had any books and records. The Court held that the presumption of correctness attached to the notice. We think such holding was dicta because the deficiency was independently established and the Commissioner's figures cut to less than half.

In *Cohen* v. *Commissioner,* 10 Cir. (176 F. 2d 934) the Court found that fraud was independently established when it holds that (p. 397) there was creditable evidence that the taxpayer received large sums of money from night club operators as protection money. Here the Court held the presumption to exist citing *Snell Isle, Inc.* v. *Commis-*

sioner, 5 Cir. (90 F. 2d 481); but in the latter case the statute of limitations did not intervene, at least it was not pleaded, therefore, it and the two cases springing from it are not authority on the question.

Now let us see on how much sounder ground is the decision of the Tax Court in another exception to the statute; that is, the exception that applies a five year limitation in case 25% is omitted from gross income. The court said in *C. A. Reis* (I.T.C. 9, 13):

> "We are unable to conceive that the presumption of the correctness of a deficiency notice, which in the ordinary case the petitioner must meet, was intended by Congress to be used as a substitute for evidence in a case where the respondent has the burden of proof as here he had under the various cases first above cited. To adopt a classic to the case, the deficiency notice is a shield, not a sword. It is a defense where the petitioner has the onus of proof, not a weapon where the respondent has the burden. The respondent, under the theory he advances here, might with equal logic contend that he could escape the burden of proof in a case "involving fraud, under section 293 (b), or the burden of proving that a return was 'false and fraudulent * * * with intent to evade tax' under section 276 (a), of the various revenue acts, merely by making a determination of fraud or fraudulent intent to evade tax."

The above case was followed by the Tax Court in *T. M. Stanton* in par. 47,251 of Volume 19 P. H. Memo. T. C., wherein the Court said at page 47—883:

> "In that case [Reis] we pointed out that the determination of deficiency is not to be considered as evidence or a substitute for evidence. Therefore respondent's determination that petitioner received $20,381.68 in 1942 is not evidence that he did so, for the purpose of resolving any issue on which the respondent has the burden of proof, even though, as we have seen, the determination of deficiency must be approved for lack of evidence where the petitioner has the burden of disproving it."

To the same effect *Barth A. Easton et al.* (1943—P. H. T. C. Memo. par. 43063); and in *Elsa S. Burrows* (1943—P. H. T. C. Memo. par. 40308) where the Tax Court held that the Commissioner was not relieved of the burden of bringing his case within the exception of the statute even though the taxpayer did not cover the adjustment by an assignment of error—it held that in the absence of an express concession the Commissioner could only satisfy the burden by affirmative evidence.

This Court has had a high regard for the Tax Court in deciding tax cases; and it appears to us that its profound analysis of the presumption and its absence carries much more weight than the cryptic statements of Courts relying upon an authority that does not in fact involve the statute of limitations.

We respectfully submit that Certiorari should issue on this subject.

Proof of Fraud

Here there is no direct proof of fraud. The fraud charge was sustained, by substituting for the books, a net worth method that omits all cash on hand, and the Tax Court omitted the cash because the taxpayer did not attempt to prove that the large amount of cash he used constantly over a period of twenty years was his own money (R. 146). There was no evidence to the contrary, nevertheless, the taxpayer failing to attempt to prove the cash was his failed to overcome the presumption of correctness attaching to the deficiency notice. The Court below likewise held that the taxpayer was required to overcome the presumption of correctness, and failing in this the Commissioner's determination prevailed, and established fraud.

How specious and whimsical such a reasoning is. Despite the fact that the statute imposes the burden of proving fraud upon the Commissioner, he accomplishes his objective in the eyes of the Court below, by the defective net worth method above set forth, because the taxpayer has not in

the words of the court succeeded in "overcoming the presumptive correctness of the Commissioner's determination of deficiency." How ludicrous, the Commissioner by issuing a deficiency notice sustains the burden of proof of fraud! In other words, the taxpayer has the burden of disproving fraud, contrary to the statute made and provided.

The books are cast aside and the net worth method substituted because the taxpayer failed to prove them accurate (R. 144); because there was no verification of the figures which appeared in the books other than by spot checks of tapes which were handwritten (R. 144, 145); because he did not show when such tapes were prepared or in whose handwriting they were made (R. 145); because he submitted no cash register tapes used in making the book entries; because he did not show that all receipts were rung up on the cash registers (R. 145); and because there was no verification of the investment income furnished to the person preparing the return (R. 145). And all this after the statute of limitations had run.

The net worth method so substituted then includes no cash, despite the fact that the record shows that over a period of twenty years before the beginning of the net worth period and for five years thereafter, the taxpayer never had a bank account (R. 147-8), on the theory that there was "no showing that the money he handled was his own." (R. 146). Nevertheless, such money when later placed into property becomes income. Suddenly—if we follow the Tax Court—the money which was not shown to be his own, upon investment becomes his own, and creates income in the year of such investment. How capricious can one get?

On such premises the Court holds that fraud is proven—direct independent proof there is none. No proof that the books are wrong, or omitted income—simply no proof of their correctness, etc.

This is not a case where the taxpayer tries to account for sudden affluence by claiming a secreted batch of money.

This is a case where the taxpayer, notoriously for over two decades, used large amounts of cash and never had a bank account.

We urge upon this Court that if fraud can be proven by such means, no taxpayer—no, none at all—is safe from losing his worldly possessions by a deficiency notice. It creates a vicious circle that strips the taxpayer of all defenses.

We submit that Certiorari should be granted to correct a miscarriage of justice and establish the law.

Conclusion

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that the petitions for certiorari be granted.

C. J. Batter
910 Seventeenth Street, N. W.
Washington 6, D. C.
Counsel for Petitioners

APPENDIX

TITLE 28 U.S.C.

Section 1254; Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * * * * * * * *

Section 2101; Supreme Court; time for appeal or certiorari; docketing; stay

* * * * * * * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * * * * * * * * *

TITLE 26 U.S.C.

Section 41. General Rule

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

Section 275. Period of Limitation Upon Assessment and Collection.

Except as provided in section 276—

(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Section 276. Same—Exceptions.

(a) False Return or No Return.—In case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Section 293. Additions to the Tax in Case of Deficiency.

(b) Fraud.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

Section 1112. Burden of Proof in Fraud Cases.

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

Section 1141. Courts of Review.

(a) Jurisdiction.—The Courts of appeals shall have exclusive jurisdiction to review the decision of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code.

Section 3748. Periods of Limitation.

(a) Criminal prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U.S.C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committee shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
Argument	8
Conclusion	12

CITATIONS

Cases:	
Barrow v. *United States*, 171 F. 2d 286	10
Bryan v. *United States*, 175 F. 2d 223, affirmed, 338 U. S. 552	6, 10
Cohen v. *Commissioner*, 176 F. 2d 394	11
Halle v. *Commissioner*, 175 F. 2d 500, certiorari denied, 338 U. S. 949	9, 11
Harris v. *Commissioner*, 174 F. 2d 70	11
Helvering v. *Mitchell*, 303 U. S. 391	10
Schuermann v. *United States*, 174 F. 2d 397, certiorari denied, 338 U. S. 831	10
Snell Isle, Inc. v. *Commissioner*, 90 F. 2d 481, certiorari denied, 302 U. S. 734	11
United States v. *Chapman*, 168 F. 2d 997, certiorari denied, 335 U. S. 853	10
United States v. *Johnson*, 319 U. S. 503	10, 11
Statutes:	
Internal Revenue Code:	
Sec. 41 (26 U. S. C. 1946 ed., Sec. 41)	2, 9
Sec. 275 (26 U. S. C. 1946 ed., Sec. 275)	3
Sec. 276 (26 U. S. C. 1946 ed., Sec. 276)	3
Sec. 293 (26 U. S. C. 1946 ed., Sec. 293)	4, 5
Sec. 1112 (26 U. S. C. 1946 ed., Sec. 1112)	4, 8, 11

304543—54

JURISDICTION

The judgment of the Court of Appeals was entered January 29, 1954. (R. 332.) A petition for rehearing (R. 333–338) was denied March 5, 1954 (R. 339). The petition for a writ of certiorari was filed May 27, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the Commissioner of Internal Revenue has borne the burden imposed upon him by Section 1112 of the Internal Revenue Code of proving that a part of the deficiency in income tax for each of the years here involved was due to fraud with intent to evade tax.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 41. GENERAL RULE.

> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's an-

nual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 1946 ed., Sec. 41.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(c) *Omission from Gross Income.*—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

* * * * *

(26 U. S. C. 1946 ed., Sec. 275.)

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a

proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U. S. C. 1946 ed., Sec. 276.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U. S. C. 1946 ed., Sec. 293.)

SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

(26 U. S. C. 1946 ed., Sec. 1112.)

STATEMENT

The Tax Court made extensive findings of fact (R. 126–144, 184–185), based upon the voluminous evidence before it, but for present purposes the material facts may be briefly summarized. For the taxable years 1935 to 1942, J. Baker Bryan, herein referred to as the taxpayer, filed timely

federal income tax returns. For the year 1943, he filed a delinquent return on April 16, 1945, and for 1944, he filed a timely joint return with his wife. The taxes shown on those returns were duly paid. (R. 127–129, 324.)[1]

In October, 1945, a deputy collector was assigned to investigate the taxpayer's returns. As a result of a joint investigation conducted by the deputy collector and another internal revenue agent, jeopardy assessments of taxes, penalties, and interest for the years 1935 to 1944, inclusive, were made by the Commissioner of Internal Revenue against the taxpayer on July 15, 1948. These jeopardy assessments were revised in minor amounts on a later date, and the amount of the jeopardy assessments, as revised, was paid by the taxpayer to the Collector of Internal Revenue. (R. 130, 324.) The penalties assessed were the 50% penalties imposed by Section 293 (b) of the Internal Revenue Code, *supra*, p. 4, for filing a false or fraudulent return with intent to evade tax. On August 30, 1948, following the jeopardy assessments, the Commissioner issued statutory notices of deficiency, pursuant to Section 273 (b) of the Internal Revenue Code, for the years 1935

[1] The tabulations on pages 127 and 128–129 of the record relating to returns filed by the taxpayer have been transposed in printing. The tabulation on pages 128–129 should follow the first paragraph on page 127, while the tabulation printed on page 127 should follow the last paragraph on page 127.

to 1944 (R. 20–22, 52–65), which were made the basis of this proceeding.[2]

In determining the deficiencies in tax assessed for the years 1935 to 1944, inclusive, the Commissioner determined that the taxpayer's books and records did not clearly reflect his income. He therefore computed the taxpayer's income for each of those years on the basis of annual increases in the taxpayer's net worth, and added the civil fraud penalty imposed by Section 293 (b) of the Code. (R. 20–22, 52–65.)

The jeopardy assessments were made, and the statutory deficiency notices were mailed, more than three years after the return for each of the years was filed, and the taxpayer had executed no waiver of the statute of limitations prescribed by Section 275 (a) of the Internal Revenue Code. (R. 130.)

In appealing to the Tax Court the taxpayer, among other things, challenged the right of the Commissioner to compute his income for the years involved on the basis of annual increases in net

[2] Prior to the jeopardy assessments of July 15, 1948, the taxpayer had been indicted in four counts for income tax evasion for each of the years 1941, 1942, 1943, and 1944, and convicted on counts three and four covering the years 1943 and 1944. Later, his conviction on counts three and four was reversed by the Court of Appeals for the Fifth Circuit (*Bryan* v. *United States*, 175 F. 2d 223, affirmed by this Court on another ground, 338 U. S. 552) and the case remanded to the District Court for a new trial. The criminal case has not been retried on account of the illness of the taxpayer. (R. 121, 325, fn. 2.)

worth, alleged that assessment and collection of the deficiencies asserted was barred by the statute of limitations in Section 275 (a) of the Code, and charged that the Commissioner had erred in asserting a fraud penalty for each of the years involved. (R. 14–15, 28–37.) These and the other issues involved,[3] and particularly the issue of fraud which was affirmatively pleaded in the Commissioner's answers (R. 25, 74–77), were submitted to the Tax Court on a stipulation of facts to which were attached as exhibits the taxpayer's returns for the years involved (R. 115–117), an additional stipulation of facts to which were attached as exhibits voluminous documentary evidence (R. 117–124),[4] and the oral testimony of eighteen witnesses, four of whom testified on behalf of the Commissioner (R. 210–254, 313–315) and fourteen of whom testified on behalf of the taxpayer (R. 254–313). On the basis of the evidence before it the Tax Court found as a fact

[3] The Commissioner also raised before the Tax Court the issue whether, if no fraud was found, the taxpayer omitted from gross income for 1943 and 1944 amounts properly includible therein in excess of 25% of the gross income reported in his returns, so as to make applicable the five year limitation upon assessment and collection provided in Section 275 (c) of the Internal Revenue Code. *Supra*, p. 3. Because of the finding of fraud, there was no need to reach this issue below. (R. 126, 151.) If certiorari is granted, the issue will be presented to this Court.

[4] All exhibits introduced in evidence were transmitted to the Court of Appeals in their original form and are not included in the printed record. (R. 319–321.)

that "The books and records kept by petitioner for the years in issue did not completely, clearly, and truly reflect his income for such periods" (R. 144), and sustained the Commissioner's method of determining his income (R. 145). The Tax Court also found, on the evidence before it, that "Some part of the deficiency was due to fraud with intent to evade tax for the years 1937, 1938, 1939, 1941 through 1944, inclusive." (R. 144.)

The Court of Appeals for the Fifth Circuit affirmed the Tax Court's decision in all respects. (R. 324–332.)

ARGUMENT

The basic issue involved here is one of fact. The Commissioner acknowledged in both of the courts below that the burden was on him to prove that the taxpayer's returns were fraudulent with intent to evade tax. (R. 326.) Section 1112 of the Code, *supra*, p. 4. The Tax Court found from the evidence that the taxpayer's returns were fraudulent for the years here involved, as well as for certain prior years.[6] (R. 144.) The Tax Court's finding of fraud was based upon the evidence before it, independent of any presumptive correctness of the Commissioner's determination of deficiencies in tax. In reviewing the Tax Court's findings and decision, the Court of

[6] The taxpayer appealed only from the Tax Court's decision for the years 1941, 1942, 1943, and 1944. (R. 189–194, 196–200.)

Appeals correctly stated that "The primary question presented by this petition to review is whether the finding of the Tax Court that the Commissioner discharged that burden [to prove fraud] is clearly erroneous." (R. 326.) After a thorough and careful review of the evidence, the Court of Appeals (R. 327, 330–331) affirmed the findings and decision of the Tax Court in all respects.

The Commissioner offered ample evidence to sustain his burden of proving fraud. The stipulation and additional stipulation of facts (R. 115–124) and attached exhibits (not printed), together with oral testimony of four witnesses (R. 210–254, 313–315), show that taxpayer had increases in net worth and had made expenditures for personal expenses far in excess of the amount of income reported in his returns for each of the years involved (R. 327). The record also shows that the net worth method was justified, for while the taxpayer did have receipts and disbursement journals and certain other records covering *some* of the sources from which his income was derived, he had no records whatsoever covering other sources of income which were shown on his returns and from which he reported substantial amounts of income. (R. 327.) See Section 41 of the Internal Revenue Code, *supra,* pp. 2–3; *Halle* v. *Commissioner,* 175 F. 2d 500 (C. A. 2d), certiorari denied, 338 U. S. 949, and cases therein cited. This method

of computing income was approved by this Court in a criminal prosecution for tax evasion in *United States* v. *Johnson,* 319 U. S. 503, and in many court of appeals decisions, where the taxpayer kept no records or kept inadequate records.

Bryan v. *United States,* 175 F. 2d 223 (C. A. 5th) (affirmed by this Court upon another ground on taxpayer's petition, 338 U. S. 552), is not, as the taxpayer contends, binding here. That case was a criminal prosecution of the same taxpayer for the same years involved here; and proof beyond a reasonable doubt was required. There, the Court of Appeals for the Fifth Circuit (the same court which decided the instant case), one judge dissenting, held that the Commissioner had failed to establish definitely that the taxpayer had no assets at the beginning of the net worth period other than those found by the government auditor.[6] The instant case involves civil fraud and "there is no burden upon the Government to prove its case beyond a reasonable doubt." *Helvering* v. *Mitchell,* 303 U. S. 391, 403. In fact, this Court, in upholding a criminal conviction by use of the net worth method, stated that to estab-

[6] The decision in *Bryan* v. *United States, supra,* seems to be contrary to the decision of this Court in *United States* v. *Johnson, supra.* See also *United States* v. *Chapman,* 168 F. 2d 997 (C. A. 7th), certiorari denied, 335 U. S. 853; *Barrow* v. *United States,* 171 F. 2d 286 (C. A. 5th); *Schuermann* v. *United States,* 174 F. 2d 397 (C. A. 8th), certiorari denied, 338 U. S. 831.

lish fraud "Of course the government did not have to prove the exact amounts of unreported income by Johnson"; that to require more or more meticulous proof than the record there disclosed "would be tantamount to holding that skilful concealment is an invincible barrier to proof." *United States* v. *Johnson,* 319 U. S. 503, 517–518.

The rulings below (R. 148, 326) that "once fraud is established, the statute of limitations does not apply and the petitioner must disprove the deficiencies" are in harmony with the decisions in *Harris* v. *Commissioner,* 174 F. 2d 70 (C. A. 4th); *Cohen* v. *Commissioner,* 176 F. 2d 394 (C. A. 10th); *Snell Isle, Inc.* v. *Commissioner,* 90 F. 2d 481 (C. A. 5th), certiorari denied, 302 U. S. 734, cited in a footnote to the opinion below (R. 326); and other court of appeals decisions to the same effect. See *Halle* v. *Commissioner,* 175 F. 2d 500 (C. A. 2d), certiorari denied, 338 U. S. 949, and cases therein cited. These uniform decisions are clearly correct. The applicable statute, Section 1112 of the Internal Revenue Code, *supra,* p. 4, provides simply that where there is an issue of fraud, "the burden of proof *in respect of such issue* shall be upon the Commissioner." (Emphasis added.) This requirement was fully satisfied in the instant case, and it followed, as the courts below held, that the taxpayer could neither invoke the statute of limitations nor evade his burden of disproving the deficiencies.

It is equally clear, and inappropriate for further review by this Court, that the Tax Court, affirmed below, did not err in refusing to credit the testimony of taxpayer's wife that at the beginning of the net worth period involved here taxpayer had a large sum of money in a safety deposit box. As pointed out by the Court of Appeals (R. 330), her testimony conflicted with the fact that during this very period taxpayer was making purchases of equipment on the installment plan, one of which purchases was repossessed; and that he was also paying $50 a month toward the purchase of a house, which included comparatively large interest payments.

CONCLUSION

The decision of the court below is correct. It is supported by the evidence. It is not in conflict with any other decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

JUNE 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954

JUL 22 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 330

J. Hayes Bayer and Mary Byrnes Bayer, *Petitioners*,

vs.

Commissioner of Internal Revenue, *Respondent*.

J. Hayes Bayer, *Petitioner*,

vs.

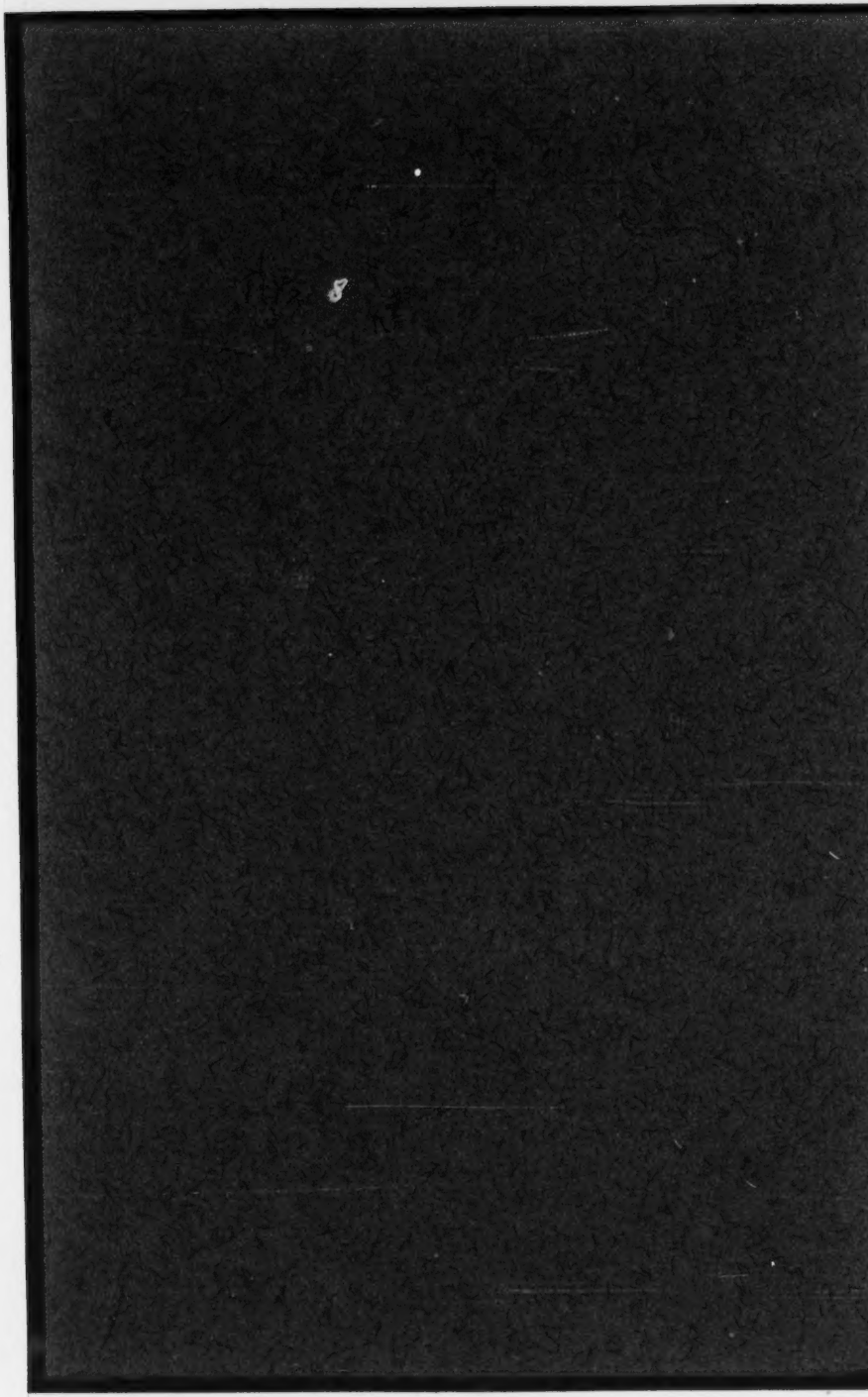
Commissioner of Internal Revenue, *Respondent*.

On Petitions for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

C. J. Hyman
910 Seventeenth Street, N. W.
Washington 6, D. C.
Counsel for Petitioners

Byron S. Adams Printing Co., Washington, D. C.



IN THE

Supreme Court of the United States

October Term, 1954

No. 100

J. Baker Bryan and Mary Evelyn Bryan, *Petitioners,*

vs.

Commissioner of Internal Revenue, *Respondent.*

J. Baker Bryan, *Petitioner,*

vs.

Commissioner of Internal Revenue, *Respondent.*

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR THE PETITIONER

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The brief filed by the respondent in opposition to our petition for a writ of certiorari is not responsive and contains direct contradictions—therefore, we are compelled to file a reply. In this reply we address ourselves soley to such subjects.

QUESTIONS PRESENTED

The respondent maintains that there is but one question —namely, did he bear the burden of proof of proving fraud; whereas, we submit that the questions we raise go much further. We submit that in determining whether the respondent has borne such burden, other factors must be considered, such as, the presumption of correctness attaching to such deficiency notice when it is issued after the statute of limitations has expired (Question 1); is the use of the net worth method a proper form of proof where the Government auditors are unable to say their computation includes substantially all the assets of the taxpayer at the beginning of the period and there is nothing to preclude the taxpayer from the proffer of proof of other assets (Question 2); where the same Court in a criminal case involving the same taxpayer has held that such net worth method fails to make out a prima-facie case, can it be held that such method, containing the same defects does make out a prima-facie case in a civil case (Question 3); can the Court exclude cash from the net worth computation—where the record shows that the taxpayer for decades has dealt only in cash—on the grounds that "there was no showing that the mony was his own" (Question 4); did the Court below err in holding that the Tax Court could reject the testimony of large cash reserves; when in fact, the Tax Court simply held that the taxpayer failed to show such money was his own (Question 5); and, could the respondent depart from the regular method of accounting employed by the taxpayer (Section 41) and substitute the net worth method, where one Government auditor testified that he did not audit the books and the other testified that he "switched" to the net worth method because he found public records respecting real estate omitted from the books, although such omissions were not improper (Question 6-(a)); was the burden of proving the correctness of the books affirmatively upon the taxpayer as the Tax Court opined or, was it part of the respondent's burden to establish the incorrectness of the books to authorize a departure

to and application of the net worth method (Question 6-(c)); can fraud be established in the absence of any direct proof of failure to account for income or duplicity in maintaining books (Question 6-(b)).

Fraud, can be established by circumstances; but, it seems to us that there must be clear and convincing evidence of fraud, instead of deducing fraud, by ignoring the books contrary to the statute; ignoring cash where there is a pattern of cash dealings over a score of years; and thrusting upon the taxpayer the burden of proof of ownership of such cash, instead of requiring the respondent to adduce proof that such cash was the property of others.

Last but not least, we have this contradiction. Assuming arguendo, that prior to the years at issue, the cash in question was not the cash of the taxpayer, what happened to make that cash his during the years at issue, so that, upon conversion of such cash into property, it made such cash income during the years at issue? Either it was his before the years in which it was converted into property, or, he still owed such cash to the true owners. The respondent offered no evidence showing circumstances under which the cash previously ignored suddenly became income.

CONTRADICTIONS IN THE ARGUMENT

On page 6 (second paragraph) the respondent states that he determined that the taxpayer's books and records did not clearly reflect his income. He makes this statement despite the testimony of his two witnesses, one of whom testified he did not audit the books (R. 234, 236, 244) and the other testified that the omissions of real estate transactions were not includible in the returns (R. 212, 226). Then on page 9 (third sentence of second paragraph) he states that:

> "While the taxpayer did have receipts and disbursements journals and certain other records covering *some* of the sources from which his income was derived, he had no records whatsoever covering other sources of income which were shown on his returns

and from which he reported substantial amounts of income. (R. 327)."

Reference to the citation (R. 327) throws no light on the income referred to—it appears to be quoted from the opinion of the Court below. A review of the testimony shows that the only income not appearing on the books of the business was the income from rents from *personal* holdings of real estate, and these were shown on the returns in a lengthy schedule for each piece of property. There is no evidence whatsoever, of the omission of any income, business or personal; therefore, how does the inclusion of such income on the return establish fraud?

On page 8 (fifth sentence of Argument) the respondent contends that the Tax Court's finding of fraud was independent of any presumption attaching to the deficiency notice; nevertheless on page 11 (first and fifth sentence of second paragraph) he relies upon the presumptive correctness of such deficiency notice.

On page 10 (second and fourth sentence of second paragraph) the respondent contends that the degree of proof is different in a criminal case then it is in a civil case. With this we do not disagree. Our contention is that where a Court in a criminal case holds that the evidence does not establish a prima-facie case, the same evidence in a civil case cannot be held to be proof "beyond a reasonable doubt". A prima-facie case, or the absence of one, is the same in either event—the absence of a prima-facie case constitutes no degree of proof at all.

CONCLUSION

WHEREFORE, it is respectfully requested that the writ issue.

Respectfully submitted,

C. J. BATTER
910 Seventeenth Street, N. W.
Washington 6, D. C.
Counsel for Petitioners